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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

KEEN A. UMBEHR,

Cross-Petitioner,

v.

GLEN HEISER AND GEORGE SPENCER,

Cross-Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether government officials who take retaliatory action against an independent contractor for speech on matters of public concern are entitled to qualified immunity.

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The Respondent, Keen A. Umbehr, respectfully requests that, in the event the Petition for a Writ of Certiorari submitted by Petitioners Glen Heiser and George Spencer is granted, a writ of certiorari be granted to review that portion of the judgment of the United States Court of Appeals for the Tenth Circuit finding that Petitioners are entitled to qualified immunity.

OPINIONS BELOW

Complete references to the opinions below are contained in Respondent's Brief in Opposition (Br. Opp.) at 1-2.

JURISDICTION

The jurisdictional foundation for this action is discussed in the Petition for Writ of Certiorari (Petition) at 2. Petitioners' request for rehearing was denied by the court of appeals on February 10, 1995. This Conditional Cross-Petition is filed within ninety (90) days of that decision. Sup. Ct. R. 13(.1) and (.4).

STATEMENT OF THE CASE

Respondent brought suit against Petitioners in both their official and individual capacities, alleging that his contract with Waubunsee County, Kansas, for residential solid waste collection was terminated based on his public criticisms of the County Commission. The Complaint maintained that this action constituted a violation of his rights under the First and Fourteenth Amendments to the United States Constitution.[1]

The district court granted summary judgment to Petitioners, concluding that even if Respondent's

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[1]A more complete discussion of the pertinent facts and procedural background is contained in Respondent's Brief in Opposition. Br. Opp. at 3-9.

allegations were true, Petitioners were entitled to consider Respondent's speech on matters of public concern in deciding whether to continue the contractual relationship. Petitioners' Supplemental Appendix (Supp. App.) 41a. Based on this conclusion, the district court found that Petitioners were also entitled to qualified immunity against all claims brought against them in their individual capacities. Supp. App. 48a-49a.

The United States Court of Appeals for the Tenth Circuit reversed the district court's decision, finding that the First Amendment prohibits official retaliation against independent contractors for speaking out publicly about the manner in which government affairs are conducted. Petitioners' Appendix (App.) 30a. The court, however, affirmed the grant of qualified immunity to Petitioners in their individual capacities. App. 31a. Without extended discussion, the court held that Petitioners "should be qualifiedly immune from Mr. Umbehr's claim for damages against them in their individual capacities, given the uncertainty in this area of the law." *Id.*

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

Despite its adherence to a consistent line of authority from this Court and its application of existing circuit precedent, the court of appeals found that an independent contractor's right to speak out on political issues without fear of official reprisal was not "clearly established" at the time Respondent's contract was terminated, and thus it found that Petitioners were entitled

to qualified immunity. Because this decision conflicts with the holding of the Fifth Circuit in *Blackburn v. City of Marshall*, 42 F.3d 925, 935 (5th Cir. 1995), prior rulings of the Tenth Circuit itself, and analogous decisions from this Court, conditional review of this important First Amendment question is appropriate.

I.

REVIEW IS NECESSARY TO RESOLVE CONFLICTING RULINGS AMONG THE COURTS OF APPEALS

Government officials performing discretionary functions may be held individually liable for their conduct in situations where their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The court of appeals' conclusion that Petitioners violated no clearly established constitutional constructs by taking adverse action against Respondent based on his speech is in direct conflict with the holding of the Fifth Circuit. *Blackburn v. City of Marshall*, 42 F.3d 925, 935 (5th Cir. 1995). Because the government has no cognizable interest in retaliating against speech that is critical of its policies, the court in *Blackburn* held that adverse actions taken in response to protected expression constitute a violation of an individual's "First Amendment rights and that any reasonable official in [that] position should have so realized." *Id.*

Should the Court agree to review the court of appeals' finding that independent contractors are protected by the First Amendment from retaliatory action, the existence of conflicting authority in these two circuits regarding the availability of qualified immunity in such cases counsels in favor of reviewing this substantially related question. Resolution of the official capacity questions will clarify the contours of independent contractors' First Amendment rights and thus will necessarily aid the analysis of whether a public official who has retaliated against an independent contractor for engaging in speech on matters of public concern has violated a clearly established constitutional right. Accordingly, if the Court grants Petitioners' request for a writ of certiorari concerning the claims against Petitioners in their official capacity, then it should simultaneously resolve a difference of opinion among the circuits on the closely connected question regarding Petitioners' individual liability for their unconstitutional actions.

II.

THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH A PRIOR DECISION OF THAT COURT AND IS OTHERWISE ERRONEOUS

In addition to the existence of contrary authority in other circuits, the court of appeals decision is also in conflict with its own precedents, which established, prior to the Petitioners' decision to terminate Respondents' contract, that independent contractors are protected by the First Amendment from retaliation based on their speech.

In *Abercrombie v. City of Catoosa*, 896 F.2d 1228 (10th Cir. 1990), the Tenth Circuit addressed a claim brought by a tow truck operator who alleged that he had been removed from a referral list maintained by the local police department based, in part, on his support for an unsuccessful mayoral candidate. The jury found for the plaintiff and awarded compensatory and punitive damages against the local police chief in both his official and individual capacities. *Id.* at 1230. The district court, however, entered judgment notwithstanding the verdict for the defendant. *Id.*

On appeal, the Tenth Circuit reversed, finding that government officials may not withdraw government benefits in retaliation for speech.

> [E]ven though a person has no 'right' to a valuable government benefit and even

> though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially his interest in freedom of speech.

Id. at 1233 (quoting *Perry v. Sinderman*, 408 U.S. 593, 597 (1972)). Based on this holding, the court reinstated that portion of the monetary award founded on plaintiff's First Amendment claim as well as the jury's award of punitive damages. *Id.*

The Tenth Circuit's opinion in *Abercrombie* was issued nearly a full year prior to Petitioners' decision to terminate Respondent's contract. At the particular time that Petitioners acted, therefore, the law in the Tenth Circuit was clear both that independent contractors were protected by the First Amendment from retaliation for speech and that government officials engaging in such conduct could be held individually liable for their actions. As a result, Petitioners were not entitled to immunity from individual liability because the court of appeals had already established, consistent with this Court's precedents, that such retaliatory action constitutes a violation of the First Amendment. *See, e.g., Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988) (law is "clearly established" when decided by court of appeals for that jurisdiction).

Moreover, not only does the Tenth Circuit's own precedent clearly establish that any form of official retaliation in response to speech on matters of public concern constitutes a clear and unequivocal infringement on First Amendment freedoms, but, as explained in Respondent's Brief in Opposition, every court of appeals to have addressed the question at the time of Petitioners' actions had come to precisely the same conclusion. Br. Opp. at 11-13. In fact, the only case to reach a contrary result, *Downtown Automobile Parks v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), *cert. denied*, 112 S. Ct. 640 (1991), was decided several months after the January 1991 decision to revoke Respondent's business relationship with the County.[2]

In addition, this Court has never suggested, in any context, that government officials possess an unqualified right to punish speech on matters of public concern. On the contrary, the Court has consistently emphasized that governmental entities must establish a substantial or compelling interest in regulating speech before actions that chill or inhibit public debate will be sustained. Br. Opp. at 19-20. No decision from this Court, therefore, would provide a government official with any conceivable basis for concluding that retaliation against an independent

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[2]Although several courts had concluded prior to Petitioners' decision that independent contractors are not protected by the First Amendment from patronage based contracting decisions, App. 11a-13a, the court of appeals properly concluded that these decisions have "limited relevance to whether independent contractors should be protected against retaliation for speech on matters of public concern." App. 29a. *See also* Br. Opp. at 14-15.

contractor for speech on matters of public concern would be consistent with established First Amendment tenets.

In view of existing precedent from this Court, the Tenth Circuit, and other circuits, Petitioners simply could not reasonably conclude that the termination of a contractual agreement in retaliation for Respondent's critical public statements comported with existing First Amendment principles. Indeed, the law at the time of the decision clearly established that government officials may not wield their economic power over citizens as a device to control the content of public debate or to silence vocal opponents of their policies. Moreover, these precedents are moored not in a pedantic understanding of arcane legal principles, but in the commonsensical notion that the First Amendment guarantees all citizens the right to participate in public debate without fear of unwarranted official reprisals. Accordingly, the Tenth Circuit's conclusion that Petitioners violated no clearly established constitutional right when they terminated Respondent's contract in retaliation for his criticism of their actions is in error.

CONCLUSION

For these reasons, should the Court grant Petitioners' request for a Writ of Certiorari, the Conditional Cross-Petition for a Writ of certiorari should similarly be granted.

Respectfully submitted,

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